

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARGARET M. LEAR,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 00-5517
	:	
KENNETH S. APFEL, COMMISSIONER OF	:	
SOCIAL SECURITY ADMINISTRATION,	:	
	:	
Defendant.	:	

**MEMORANDUM**

ROBERT F. KELLY, J.

FEBRUARY 22, 2001

Before this Court is the Motion to Dismiss Plaintiff's Complaint filed by Defendant, Kenneth S. Apfel, Commissioner of the Social Security Administration ("Defendant" or "Commissioner").<sup>1</sup> Plaintiff Margaret M. Lear ("Ms. Lear") brings this action seeking judicial review of the denial of a claim for disability benefits under Title II of the Social Security Act.

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<sup>1</sup> In the Motion, the Defendant has attached material outside of the pleadings (i.e., the affidavit of Olga C. Kelley). See Def.'s Mot. to Dismiss Pl.'s Compl. The Court will continue to treat such Motion as a Motion to Dismiss because "[i]n deciding whether there is subject matter jurisdiction, affidavits and other matters outside the pleadings may be considered." Freeman v. Herman, No. 98-2649, 1998 WL 813426, at \*3 (E.D. Pa. Nov. 24, 1998), aff'd, 181 F.3d 85 (3d Cir. 1999)(citing Mortenson v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)(citation omitted)). Unlike the practices under Federal Rule of Civil Procedure 12(b)(6), "the fact that matters outside of the pleadings are considered does not transform a Rule 12(b)(1) motion to dismiss into a motion for summary judgment." Id. at \*3 (citing Lefkowitz v. Lider, 443 F.Supp. 352, 354 (D. Ma. 1978)(citations omitted)).

Defendant argues that Ms. Lear's Complaint should be dismissed for lack of subject matter jurisdiction because Ms. Lear has failed to exhaust her administrative appeal remedies and has not received a "final decision" of the Commissioner required to obtain judicial review under the Social Security Act section 205(g), as amended, 42 U.S.C. section 405(g).<sup>2</sup> For the reasons stated, the Motion is granted.

## **I. BACKGROUND**

On July 9, 1998, Ms. Lear applied for Social Security Disability Insurance Benefits. Her claim was denied by the Social Security Administration ("SSA"). On April 6, 1999, upon Ms. Lear's request for reconsideration, the SSA found that the denial of her Disability Insurance Benefits was proper. In the notice of reconsideration denial, the SSA advised Ms. Lear that she could request a hearing before an Administrative Law Judge ("ALJ") of the Office of Hearings and Appeals, but she was required to request such hearing within sixty days from the date that she received the notice. (See Def.'s Mot. to Dismiss Pl.'s Compl., Ex. 1.)

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<sup>2</sup> 42 U.S.C. section 405(g) reads, in pertinent part, as follows:

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action.

42 U.S.C. § 405(g).

On July 27, 1999, Ms. Lear, through her attorney, filed a Request for a Hearing Before an Administrative Law Judge and submitted an Appointment of Representative Form.<sup>3</sup> On October 4, 1999, the ALJ issued a Notice of Dismissal based on the premise that Ms. Lear's Request for a Hearing was untimely and that there was no good cause to extend the time for filing. Ms. Lear filed a Request for Appeals Council Review of Dismissal on November 30, 1999. On September 1, 2000, the Appeals Council denied review and concluded that Ms. Lear did not have a basis for challenging the ALJ's dismissal. On October 31, 2000, Ms. Lear filed a civil action in this Court. Defendant filed this Motion to Dismiss Plaintiff's Complaint on December 8, 2000.

## **II. DISCUSSION**

Federal courts do not have general jurisdiction. Bacon v. Sullivan, 969 F.2d 1517, 1519 (3d Cir. 1992)(citing Bender v. Williamsport Area School Dist., 475 U.S. 534, 541 (1986)).

Federal courts only have the power "that is authorized by Article III of the Constitution and statutes enacted by Congress pursuant

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<sup>3</sup> Ms. Lear avers that she first filed a timely Request for a Hearing Before an Administrative Law Judge with the Bustleton Avenue Social Security Office on June 4, 1999. (Pl.'s Resp. to Def.'s Mot. to Dismiss Pl.'s Compl. at 1-2.) Ms. Lear further avers that her attorney spoke with Mrs. Super, a representative of the Bustleton Avenue Social Security Office, who advised that Ms. Lear's filing of the Request for a Hearing would be protected as long as Ms. Lear immediately filed a second Request for a Hearing. (Id. at 2-3.) On July 27, 1999, Ms. Lear, through her attorney, filed a Request for a Hearing Before an Administrative Law Judge with the Social Security Administration. (Id. at 2.)

to that Article." Id. at 1519; 541. Jurisdiction over Social Security benefits cases is provided by Title II of the Social Security Act, which limits judicial review to a "final decision" of the Secretary of Health and Human Services.<sup>4</sup> Id. See also Social Security Act section 205(g), as amended, 42 U.S.C section 405(g). Therefore, "[a] final decision [by the Secretary] is 'central to the requisite grant of subject matter jurisdiction.'" Fitzgerald v. Apfel, 148 F.3d 232, 234 (3d Cir. 1998)(quoting Mathews v. Eldridge, 424 U.S. 319, 328 (1976)). A decision by the Secretary not to consider an untimely request for review is not a "final decision" that is subject to judicial review. Bacon, 969 F.2d at 1519. Therefore, the Court does not have jurisdiction over Ms. Lear's claim because her claim requests judicial review of the Commissioner's denial to consider an untimely request for review.<sup>5</sup>

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<sup>4</sup> In Social Security cases, the role of the Secretary of Health and Human Services was transferred to the Commissioner of Social Security pursuant to the Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464, effective March 31, 1995. Therefore, all references to the Secretary are equally applicable to the Commissioner.

<sup>5</sup> In her Complaint, Ms. Lear argues that she made a timely Request for Review of the ALJ's dismissal and that her "action is an appeal from a Final Administrative decision." (Compl., ¶¶ 4-5.) Ms. Lear further argues that it was not her fault that the SSA did not receive her Request for Review and that "the Defendant, by its own actions, has blocked Plaintiff from pursuing this case." (Pl.'s Resp. to Def.'s Mot. to Dismiss Pl.'s Compl. at 2.) Whatever are the circumstances of the filing of Ms. Lear's Request for a Hearing, her case before this Court is one dealing with a decision by the Commissioner not to

"Ordinarily, judicial review is barred absent a 'final decision' by the Commissioner of Social Security." Fitzgerald, 148 F.3d at 234 (citing Mathews, 424 U.S. at 328). However, there is an exception to the jurisdictional bar found in section 205(g) of Title II of the Social Security Act, 42 U.S.C. section 405(g), which comes into play when the Complaint contains a colorable constitutional claim. Melloy v. Shalala, No. 94-1375, 1994 WL 689963, at \*5 (E.D. Pa. Dec. 7, 1994)(citing Califano v. Sanders, 430 U.S. 99, 109 (1977); see also Mathews, 424 U.S. at 330). As a result of this exception, the Court will only have subject matter jurisdiction over this case if Ms. Lear has asserted a colorable constitutional claim against the Defendant. Since the Court finds that Ms. Lear has not asserted a colorable constitutional claim, her Complaint will be dismissed for lack of subject matter jurisdiction.

In Califano v. Sanders, 430 U.S. 99, the United States Supreme Court ("Supreme Court") "recognized a single exception to the general rule that the Secretary's refusal to reopen a previous final decision is not subject to judicial review." Aponte v. Sullivan, 823 F.Supp. 277, 281 (E.D. Pa. Mar. 4, 1993). As a result, "judicial review of the Secretary's decision not to reopen a claim is available under 42 U.S.C. section 405(g) when the claimant presents 'colorable constitutional claims.'" Id. at

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consider an untimely Request for Review.

281. In recognizing the colorable constitutional claim exception, the Supreme Court in Sanders reasoned that "constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." Califano v. Sanders, 430 U.S. at 109.

The United States Court of Appeals for the Third Circuit ("Third Circuit") has followed the reasoning set forth in Sanders. Id. In Penner v. Schweiker, 701 F.2d 256 (3d Cir. 1983), the Secretary violated his own regulations when he sent a notice to plaintiff denying his request for reconsideration, but failed to send such notice to plaintiff's attorney who represented the plaintiff because of his mental disability. Id. The Third Circuit held that the district court had jurisdiction because the claimant raised a colorable constitutional claim by asserting that the Secretary failed to provide him with adequate notice of an adverse determination which constituted a denial of due process. Id. Likewise, in Aponte v. Sullivan, 823 F.Supp. 277, the United States District Court for the Eastern District of Pennsylvania held that the plaintiff presented a colorable constitutional claim by asserting that the notice given to him failed to inform him of the adverse consequences of not filing a Request for a Hearing. Id. at 282. The Court ordered the parties to more fully brief the due process issue because the

possibility of defective notice and the SSA's application of res judicata in order to bar plaintiff's subsequent claim presented a colorable constitutional claim. Id.

In the present case, Ms. Lear alleges that by denying her "the right to judicial review of the dismissal of her Request for a Hearing, denies [her] basic entitlement to equal protection and due process under the law." (Pl.'s Resp. to Def.'s Mot. to Dismiss Pl.'s Compl. at 5.) In both her Complaint and Response to Defendant's Motion to Dismiss Plaintiff's Complaint, Ms. Lear fails to explicitly state how such denial violates her basic entitlement to equal protection and due process. "The mere allegation of a due process violation is not sufficient to raise a 'colorable' constitutional claim to provide subject matter jurisdiction." Banks v. Chater, 949 F.Supp. 264, 266 (D.N.J. 1996). If it was permitted that a "'mere allegation of a denial of due process can suffice to establish subject matter jurisdiction, then every decision of the Secretary would be [judicially] reviewable by the inclusion of the [magic] words' 'arbitrary' or 'capricious.'" Id. at 266-267 (quoting Robertson v. Bowen, 803 F.2d 808, 810 (5th Cir. 1986)). Such a result would undermine a statutory scheme which was designed to limit judicial review. Id. at 267 (quoting Holloway v. Schweiker, 724 F.2d 1102, 1105 (4th Cir. 1984)).

Ms. Lear does not argue that she received inadequate

notice of the denial of her request for reconsideration nor does she argue that she received inadequate notice that she must file her Request for a Hearing within sixty days from the date that she received the notice. Ms. Lear argues instead that the SSA's determination that she is ineligible for Social Security Disability Insurance Benefits was incorrect and that the SSA mistakenly denied her Request for a Hearing based on untimeliness of filing. Therefore, Ms. Lear is requesting that the Court reexamine both the SSA's initial determination denying her Disability Insurance Benefits and the SSA's denial of her Request for a Hearing for untimeliness. The Court finds that such a claim is precisely the type of issue that was intended and is best handled within the auspices of the regulatory scheme of the SSA.

Ms. Lear fails to set forth how the SSA incorrectly denied her Social Security Disability Insurance Benefits and how a hearing would remedy such a mistake. Significantly, Ms. Lear offers no evidence to the Court other than that which was considered and rejected by both the ALJ and the Appeals Council in their rulings denying her hearing. Specifically, Ms. Lear fails to offer the Court any concrete evidence that she did make a timely filing of her Request for a Hearing or that the SSA's denials of her Disability Insurance Benefits and hearing are in violation of her rights of equal protection and due process of



law. As such, Ms. Lear's allegations of violations of her equal protection and due process of the law fail to present a colorable constitutional claim.

### **III. CONCLUSION**

The Court finds that it does not have jurisdiction over Ms. Lear's claim because there has been no "final decision" by the Commissioner with respect to her claim and because the Court does not believe that she has presented a colorable constitutional claim on which jurisdiction may rest.

An appropriate Order follows.

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v.	:	NO. 00-5517
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KENNETH S. APFEL, COMMISSIONER OF	:	
SOCIAL SECURITY ADMINISTRATION,	:	
	:	
Defendant.	:	
	:	

**ORDER**

AND NOW, this 22nd day of February, 2001, upon consideration of Defendant's Motion to Dismiss Plaintiff's Complaint (Dkt. No. 3), and the Response thereto, it is hereby ORDERED that the Motion is GRANTED.

BY THE COURT:

Robert F. Kelly,	J.
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